(3)

No. 00-163

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1999

CHERI TROY,
Petitioner,

v.

PIERCE COUNTY,
Respondent

On Petition For Writ of Certiorari to the
Court of Appeals, Division II, of the State of Washington

REPLY TO BRIEF IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

In this case the government desires to permanently preserve areas of land in a natural, undisturbed state, and a County ordinance accomplishes this by requiring owners of the selected land, as a building permit condition, to "protect" the selected area by deeding a tract, easement, or land dedication to "the County" or "the public", and, by having county signs installed every 30 feet to mark the boundaries of the preserved tract.

1) Where the owner's proposed construction does not create the need for a land preserve, is just compensation required under the U.S. Constitution's Fifth Amendment (applied to the States through the Fourteenth Amendement) for the property conveyance and/or for the physical occupation of the signs?

2) In acquiring the above tract, where the County provides no hearing, nor any process for getting compensation, and requires the conveyance to be made by recording a plat of subdivision that violates plat statutes (a gross misdemeanor), is there just cause for damages for denial of due process under the U.S. Constitution's Fifth Amendment and/or for deprivation of civil rights under 42 U.S.C. § 1983?

3) Since the above ordinance is applied at development time, when it is common to have the land as subject or collateral in financing contracts, is the County's appropriation of a property interest without any consideration of existing contract interests or obligations, in violation of Article 1 § 10 [1] of the U.S. Constitution: "No State shall * * * pass any * * * Law impairing the Obligations of Contracts * * *" ?

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REPLY

In its brief, the County quotes the wetland regulations which require both the installation of permanent markers and the creation of an easement, dedication, or similar mechanism, (Response, p. 2, 6a). And, the County admits that it required Troy to have the markers installed, and to record a document on title. The response brief, page 2, also mentions that variance from those requirements was denied.

Yet Pierce County's opposition is based on the contention that the County's requirements did not require any physical occupation of Troy's property, nor the conveyance of a property interest. That basic assumption is repeatedly asserted without one shred of support.

I. INSTALLATION OF PHYSICAL SIGNPOSTS DOES CONSTITUTE A PHYSICAL OCCUPATION OF LAND

The County concedes that the regulation requires permanent "markers" to be placed on the land (Response p. 2, 4). (On Troy's land, to be "clearly visible" over the five-foot weed growth, these "markers" would be signs, six feet high.) However, the County raised the argument (p. 5, 6, 8) that the requirement does not constitute a physical invasion of property. This is a misstatement of law and fact.

The precedent of *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1892), *rehearing denied*, 149 U.S. 465 (1893), specifically established that the physical presence of poles is a compensible taking. The County presents no fact, no law, case law, nor law of physics to support the theory that the physical presence of the signposts is anything other than a physical occupation of the land.

II. IT IS TROY'S REFUSAL TO INSTALL THE SIGNS THAT ENABLES HER TO CONTEST THE REQUIREMENT THAT THE SIGNS BE INSTALLED.

The County raised the argument that the Court should not address the constitutionality of the sign requirement because Troy didn't install any of the signs. (Response, p. 5) This is a misstatement of law.

The County should be estopped from arguing that any construction is required, since the County's "conditions" include the provision that, "Construction of any part of the proposal validates the wetland approval and requires that the conditions be met." (Petition for Writ of Certiorari, p. G 4)

Moreover, in Washington State, the courts consider compliance with a permit requirement to be a waiver of the right to challenge it. This is readily apparent in the case of *Northwest Land & Inv. v. City of Bellingham*, 31 Wash.App. 742, 644 P.2d 740, 741, (1982). The court refused to reach the question of the lawfulness of development conditions, with the finding that, "The proximate cause of the plaintiff's loss was its decision to comply with the conditions and not seek review."

The correct interpretation of the law is, that Troy may not assess space rental damages, since the signs were not installed. However, the constitutional challenge is appropriate, is ripe, and it is quite important, as it affects not only Troy, but the 5,551 future wetland applicants. It may also affect some of the 1,029 landowners who have already installed signs. (If one is not aware of the right to compensation, one cannot have waived that right.)

III. THE "NOTICE" DOCUMENT DOES AFFECT THE LANDOWNER'S TITLE, OTHERWISE IT COULD NOT BE RECORDED.

The County raised the argument that recording the "notice" does not affect title (Response p. 4, 8). This premise is a misstatement of Washington State Law.

Title is the means whereby the owner of lands has the just possession of his property. (*Black's Law Dictionary*, 5th Ed., p. 1331, "Title, Real Property Law").

> "Conveyances and encumbrances upon real property in this state may be recorded with a county auditor where the property is located. However, only "real property rights" may be recorded." (Final Legislative Report, 1979, 46th Reg. Session and First Ex. Session, p.. 120-21 (Washington State)).

Only documents which facially purport to affect title may be recorded. (AGO 1996 No. 12 p. 6-7 (Washington State)).

The fact that the auditor not only records wetland "notice" documents, but records them as a grant from the landowner to "Pierce County" or "the public," indicates that title is most definitely affected.

IV. THE DOCUMENTS ARE A CONVEYANCE, A DEED, A DEDICATION TO THE PUBLIC

The County raised the argument that no dedication to the public occurs. If there is no deed, there can only be a taking if the property has no remaining value, and the rough propor-

tionality test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) does not apply. (Response p. 3, 4, 6, 8).

The assertion that there is no conveyance or dedication is a misstatement of fact and law. As shown in the Petition for Writ of Certiorari, p. 8-9, the County's use of the language "plat map or final binding site plan" serves to create a three acre wetland-and-buffer land preserve dedicated to the public, for the public use. If the County did not intend to create this dedication, the County would be using different words.

Similarly, if the County did not intend to create deed/title restrictions (restrictive covenants), it would not be recording restrictions on title.

If the County did not intend to go on record as the recipient of a property interest, it would not choose to record the wetland documents with "Pierce County" or " the public" named as "grantee".

However, the County deliberately chooses to do all of the above. To date, 1,029 such dedications, covenants, conveyances to the County/the public have been recorded, with the paperwork, supplied by the County, substantially the same as Troy's.

V. THE PARCEL DOES NOT REMAIN SOLELY IN TROY'S OWNERSHIP

The County raised the argument that title to the wetlands remains in the ownership of the property owner. (Response p. 3) This is a misstatement of fact and law.

Since the dedication is as a quit claim deed, giving the public an estate in the land, Troy would become, at best, a co-owner of the original parcel. Unfortunately, she would remain the owner responsible for land payments and taxes;

the public takes a free ride.

This would become readily apparent if, arguendo, Troy defaulted on the land taxes. The dedication and restrictive covenants would survive the tax sale to remain on the purchaser's tax title. Thus, the public's ownership interest in the parcel is actually a more secure interest than Troy's.

An example is the case of *City of Olympia v. Palzer*, 107 Wash.2d 225, 728 P.2d 135 (1986) in which preservation covenants survived a tax sale.

VI. PURCHASE CONTRACTS ARE IMPAIRED BY THE COUNTY'S UNCOMPENSATED ACQUISITION OF SOME OF THE PROPERTY INTERESTS THAT ARE BEING PURCHASED

The County recognizes that there is a land purchase contract, but raised the argument that there is no interference with the bargained-for terms of the contracts. (Response, p. 7) This is a misstatement of fact and/or law.

Troy has a standard real estate purchase contract. The owner/seller, Mr. Rheault, is obligated to deliver five acres of land, as a fee simple estate (subject only to the existing road easement). If he records the County's papers, the fee simple estate would be destroyed, and he could no longer satisfy his contract obligation.

Troy is allowed to use the land before payment is complete, subject to covenants not to waste, damage, or destroy the land or its timber, and to conduct farm operations in accordance with good farm practices. Deeding away the rights to use, farm, and log the land is not good farming practice, and is wasteful and damaging to both the property

and its value. Under the contract, had Troy recorded the documents, she would be in violation of the covenants, in default of contract, could be liable for damages, and subject to forfeiture of her buyer's interest.

The situation could be avoided if the County condemned or purchased the property interest they desire.

The County's case cite of *Saxe v. Breier*, 396 F. Supp. 407 (E.D. Wis. 1975), is not similar to Troy's case, but provides an interesting contrast. Saxe complained that the passage of an ordinance on the books, which changed the code requirements for massage rooms, impaired his existing contract for the lease of space for a massage parlor.

Troy does not complain that the presence of the ordinance on the books impairs her contract. Rather it is the contract of conveyance to the County that the County wishes to record on her landowners title, that directly impairs her existing land contract for title.

The *Saxe* court said that Saxe had not overcome the presumption that legislative enactments are not contractual terms. In Troy's case, the County is trying to make the contractual terms to be recorded on Troy's private land title, appear to be a legislative enactment, and thus avoid the requirement of just compensation.

CONCLUSION

The County's Brief in Opposition presents a perfect example of the tenets of takings jurisprudence at all levels throughout the State of Washington:

Tenet 1: Taking by Permanent Physical Occupation.

The requirement that physical "markers" be permanently erected on the land is NOT to be considered a physical occu-

pation, as long as the land retains some value and the owner can construct a house.

Tenet 2: Taking of Title

The requirement that an owner's title be breached by the addition of documents that are recorded as a grant from landowner to "the public" or "the County"
does NOT constitute a dedication, conveyance to the government, or taking of title. It is not a taking as long as some area of the parcel remains that may be developed.

Tenet 3: Regulatory Takings

As long as the owner's name is not completely erased from title, no "taking of title" occurs. The County's actions are therefore "regulatory", and no "taking" can occur as long as the land retains some remnant of value.

Tenet 4: Impairment of Contract

Contract is not impaired if the parties still have the ability to "enforce" bargained-for terms.

The destruction of the ability to "perform" bargained-for terms (and damages from the ensuing lawsuits for default of contract) are not to be considered.

If the above tenets do not fully comport with the Takings policies of this Court, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

You may also wish to consider summary reversal pursuant to 28 U.S.C. § 2106, to clarify the proper policies.

Dated: Sept. 5, 2000

Respectfully submitted,

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